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No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

vs.

MICHAEL COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL COOPER, ROBERT HOCHSTUHL, CHARLES PRIOLO AND MICHAEL BEHRE

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts lack power to determine on summary judgment the "objective reasonableness" of police conduct in effecting a restraint of an individual under the standard set in *Graham v. Connor*, 490 U.S. 386 (1989)?

2. Whether the lower courts abused their discretion by refusing to consider additional expert testimony submitted for the first time in connection with a motion for reconsideration after considering six separate expert reports submitted before the grant of summary judgment?

LIST OF PARTIES

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Petitioners,

and

MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as a Police Officer of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; Ambulance Attendant DAVIS, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); DAN MAC MAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Respondents.

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No. 95-579

In The

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DR. BARBARA LEE PERLMUTTER, *et al.*,

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BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL COOPER, ROBERT HOCHSTUHL, CHARLES PRIOLO AND MICHAEL BEHRE

OPINIONS AND JUDGMENTS BELOW

The oral opinion of the United States District Court dated May 23, 1994, not included in petitioners' appendix, is reproduced in the appendix hereto.

STATEMENT OF THE CASE

Upon a voluminous and complete record, the District Court and Court of Appeals for the Third Circuit found summary judgment appropriate dismissing petitioners' civil rights claims against the respondent police officers. The lower courts properly utilized the summary judgment vehicle to dispose of these claims without a jury based on the absence of any genuine issue as to any of the material facts that established the objective reasonableness of the police officers' conduct as a matter of law. Contrary to the unsupported assertions in the Petition, there is absolutely no conflict among the circuit courts of appeal with respect to the power of the federal courts to make that determination upon an appropriate factual record. The Petition for a Writ of Certiorari is meritless.

Because petitioners' Statement of the Case presents an inaccurate and grossly distorted description of the factual record before the lower courts, we are constrained to correct the misstatements and set forth the undisputed material facts upon which the courts below properly granted summary judgment in favor of the police officers. In the absence of the false light cast by the Petition, this record vividly illustrates the effectiveness, indeed the necessity, of the summary judgment device in weeding out unworthy claims of unreasonable governmental seizures under the standard set in *Graham v. Connor,* 490 U.S. 386 (1989).

Nine eyewitnesses to the incident, including the respondent police officers, the medical personnel and Julia Sinauskas, the tenant of the apartment in which the incident occurred, provided sworn deposition testimony.[1] The account of each witness was

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1. Contrary to petitioners' contention that the District Court based its findings "solely on the police testimony," the record below contained the entire deposition transcripts of each and every eyewitness to the event. Indeed, the District Court required that the complete transcripts be submitted before it would even rule on defendants' motions for summary judgment.

wholly consistent and uncontradicted. It was on the basis of this first-hand testimony of all the participants in the incident that the District Court concluded that the police officers' conduct in the course of a pre-arrest detention, restraining a violent, drug intoxicated woman who had illegally entered the basement apartment of her neighbor by crashing through her window, was objectively reasonable as a matter of law. (A.28).

The undisputed facts established that at approximately one o'clock in the morning on May 20, 1989, the decedent crashed through the glass window of Mrs. Sinauskas' basement apartment and fell approximately four feet to the floor.[2] (A.23, 30) (R.55-56; 130-32). Mrs. Sinauskas, who testified that she was sleeping at the time the decedent crashed through her window, was frightened by the intruder and immediately telephoned the police for assistance. The police, however, were already on their way to the apartment building because another tenant had reported observing a woman (presumably the decedent) "face down" on the front lawn of that building minutes earlier. Mrs. Sinauskas testified that the decedent wandered around her apartment, bouncing off the walls. (R.532; 536-38).

Shortly thereafter, police officers Michael Cooper and Charles Priolo arrived at the scene, at which time the decedent ran away from them into Mrs. Sinauskas' bedroom and began rolling around the floor, violently thrashing her arms and legs and making loud, incoherent noises. (R.134; 137; 257; 264-65). Mrs. Sinauskas testified that although she remained in her living room while the police officers attempted to calm the decedent, she could see the decedent on the floor kicking her feet and hands. The officers also observed that the drug intoxicated decedent had

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2. Contrary to petitioners' unsupported allegation, there is no evidence in the record that the decedent was thrown through the window or was herself the victim of any crime.

splats of dried blood about her body, warranting further investigation that was impossible to make while she was violently thrashing around the floor in constant movement. (A.25) (R.506; 560-61).

Officers Cooper and Priolo initially attempted to calm the decedent by crouching on the floor next to her and talking to her. According to Officer Cooper, after several minutes of talking to the decedent, she briefly stopped thrashing around and sat up, although she still was not verbally responding to the police officers' questions. After a couple of minutes of remaining relatively calm while the police officers talked to her, the decedent suddenly lunged toward a stand-alone full length mirror located in Mrs. Sinauskas' bedroom in an apparent attempt to cause the mirror to fall onto her. Officer Cooper quickly grabbed the mirror to prevent it from falling upon the decedent and further injuring her.

At that point, the decedent again became extremely violent, thrashing her arms and legs and directing her movements at the police officers. The evidence established that the decedent directed her aggression toward the police officers by "punching out" and "throwing her arms." (R.596-97). Moreover, the decedent did not respond to the police officers' verbal instructions to calm down.

By this time, the Bloomfield Volunteer Emergency Squad ("BVES") had arrived on the scene but was unable to conduct a medical assessment because of the decedent's combative state. Based on the decedent's failure or refusal to respond to their verbal instructions to stop kicking, punching and thrashing, the police officers determined that it was necessary to restrain the decedent to prevent her from injuring herself, them and the residents of the apartment and to permit the BVES to conduct a medical assessment. (A.29) (R.140-43; 269; 587-88; 594-95).

The officers initially attempted to restrain the decedent by holdi[illegible]er in place. (R.141). The police officers, however, were unable to control her violent movements and were forced to restrain the decedent by handcuffing her wrists behind her back and securing her ankles with a bed sheet.[3] Immediately after the decedent was restrained, she was promptly lifted by the BVES onto a reeves stretcher provided by the BVES. (R.151).[4] Despite the restraints, the decedent continued to thrash her body and fight the efforts of the police officers and medical personnel. (A.23-24) (R.564-65).

Upon their arrival, the BVES assumed medical control of the scene, and the Mountainside Hospital Mobile Intensive Care Unit ("MICU") paramedics assumed control upon their arrival. Paramedic Daniel MacMahon from MICU testified that he could not conduct a full medical assessment of the decedent without the risk of injury to himself and others because the decedent was attempting to bite people who had their hands next to her face, and was trying to escape whenever someone let go. (A.28) (R.335; 510). Paramedic Robert Davis from MICU observed that as the decedent was being lifted from the floor onto the reeves stretcher, she was moving her head around screaming, shouting and fighting the police and BVES. (A.24) (R425; 431). As a result, the BVES members were unable to lift the decedent onto the reeves stretcher without some assistance from the police officers.

After the decedent was placed on the reeves stretcher

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3. Petitioners assert in their Statement of the Case that the decedent was "hog tied." The undisputed evidence established that the decedent was not "hog tied" — *i.e.*, the hands and feet tied together — but rather her hands and ankles were separately secured. (R.140-43; 267; 269; 587-88; 594-95).

4. Police officer Hochstuhl estimated this time to be "under a minute." (SR.233) ("SR. __" refers to respondents' Supplemental Appendix in the Third Circuit).

stomach down, head to the side without any restriction on her breathing, the BVES used the straps located on the reeves stretcher to secure the decedent's position on the stretcher to protect her from falling or further injuring herself, particularly in light of her combative state. (A.24) (R.149; 275; 381; 535). The BVES members then promptly carried the decedent out of the apartment on the reeves stretcher and strapped her to the rolling cot. (A.24) (R.565; SR.411). The undisputed evidence established that the police officers and medical personnel acted in very difficult circumstances quickly and appropriately to gain control of the decedent and move her out of the apartment, and get her into the ambulance for transportation to the hospital.

Among their numerous unsupported assertions, petitioners claim that the amount of time that the decedent was unconscious was hotly contested. The undisputed evidence, however, established that the decedent was in constant movement and yelling from the moment she was placed on the reeves stretcher and for the less than a few minutes that followed as she was being removed from the apartment by the medical personnel. (R.149; 275; 332-33; 431-32; 564-66; 591). As the District Court found, there was simply no evidence that the decedent was in distress for any period of time. (A.30).

Petitioners also assert erroneously that the police officers placed the decedent on the reeves stretcher, fastened the straps of the reeves stretcher and carried her out on the stretcher. The voluminous factual record, however, does not contain any proof that the police officers either made the decision as to how to position the decedent on the reeves stretcher or fastened the straps to secure her. To the contrary, based on the undisputed testimony of the medical personnel, as well as the report of petitioners' own expert, Richard Hansson, the medical personnel — not the police officers — were responsible for the decedent's medical transportation and care. (R.304; 338; 442; 562; 567; 575; SR.391; 410-11).

The undisputed evidence also established that the moment the medical personnel observed the decedent to have ceased breathing, they immediately released all restraints and began to resuscitate the decedent by administering life-saving procedures. (A.30) (R.339-41; 443-44; 568-69). The decedent apparently responded and was transported to the hospital. She did not, however, regain consciousness for approximately four days at which time petitioners decided to remove the decedent from life sustaining equipment in the hospital.

It was on the basis of these undisputed material facts that the District Court and the Court of Appeals properly concluded that the police officers' conduct in restraining the decedent was objectively reasonable as a matter of law.

REASONS FOR DENYING THE WRIT

I

THE LOWER COURTS PROPERLY FOUND THE POLICE OFFICERS MET THE STANDARD SET FORTH IN *GRAHAM V. CONNOR* AND DISMISSED PETITIONERS' CIVIL RIGHTS CLAIMS ON SUMMARY JUDGMENT.

In support of the Petition for a writ, petitioners assert, as they unsuccessfully argued in the courts below, that summary judgment was inappropriate because the "objective reasonableness" of the police officers' conduct can *only* be decided by a jury. There is nothing in the opinion in *Graham v. Connor* — or in the many lower court decisions applying the *Graham* standard — that even remotely suggests that the summary judgment rule is not available (and a jury trial is required) in civil rights cases alleging the use of excessive force in which there is no genuine issue as to any material fact. Nor is

there any discord among the circuit courts of appeal. As shown below, since the Court established the standard of objective reasonableness in *Graham*, the lower courts have uniformly applied Rule 56 to dismiss claims where there was no genuine issue of material fact and the evidence was so one-sided that one party must prevail as a matter of law, and, of course, to allow claims to reach a jury where the facts were genuinely disputed and the evidence presented a sufficient disagreement. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986).

A. The "Objective Reasonableness" Standard In *Graham v. Connor* Can Be Determined As A Matter Of Law By The Courts.

In *Graham v. Connor*, the Court held that claims alleging that law enforcement officials used excessive force in the course of an arrest or other seizure of a person should be determined under the Fourth Amendment's "objective reasonableness standard." 490 U.S. at 395-96. Under this standard, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motive." *Id.* at 396. The reasonableness of the force used "must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight." *Id.*

Moreover, in assessing the reasonableness of the force used, the courts must consider the fact that police officers are often "forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 397. Because the Fourth Amendment's reasonableness test is "not capable of precise definition or mechanical application," the *Graham* opinion instructs that in determining whether the force used was reasonable, the courts must consider "the facts and

circumstances of each particular case" while "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396.

Finally, the Court made clear that "the subjective motivation of the individual officers . . . has no bearing on whether a particular seizure is unreasonable under the Fourth Amendment." *Id.* at 397. In so holding, the Court eliminated the inquiry into subjective concepts of "good faith," "malice" and "sadism," thus paving the way for summary disposition of § 1983 excessive force claims when the material facts are undisputed. *Id.* at 398-99.[5]

By adopting an objective standard and rejecting a subjective one, the *Graham* Court brought the test for judging the reasonableness of a seizure in line with that applied to other civil rights claims and defenses, which allows summary judgment to "avoid excessive disruption of government and permit the resolution of many insubstantial claims." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *See also Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton,* 483 U.S. 635, 640 n.2. (1987). Indeed, if petitioners' claim based on a snippet from the *Graham* opinion — *i.e.*, "careful attention [must be given] to the facts and circumstances of each particular case" — were taken to its logical conclusion, every excessive force claim would be required to go to a jury, and law enforcement personnel would spend more time in court defending their actions than enforcing the law because no claim against the police based on a seizure —

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5. As one commentator put it, the elimination of the good faith component removed the last remaining obstacle to disposition of excessive force claims at the summary judgment stage. Michael C. Fayz, Comment, *Graham v. Connor: The Supreme Court Clears The Way For Summary Dismissal Of Section 1983 Excessive Force Claims,* 36 Wayne Law Rev. 1507 (1990).

no matter how insubstantial — could be disposed of by summary judgment. We respectfully submit that the Court did not intend to deprive the lower federal courts of their power to apply the procedural rules to this genre of civil rights claims.[6]

In entering summary judgment in favor of the respondent police officers here, the District Court recognized that the *Graham* standard required "stand[ing] in [the police officer's] shoes and judg[ing] the reasonableness of his actions based on the information he possessed and the judgment he executed in responding to that situation." The undisputed facts and circumstances that confronted the police officers upon their arrival at the scene and the undisputed account of events in the following minutes given by nine eyewitnesses provided an unusually clear and ample record upon which the lower courts properly grounded their decisions.

The District Court correctly concluded in an opinion unanimously affirmed by the Third Circuit Court of Appeals that the police officers' conduct in restraining the decedent and assisting the BVES in placing her on the reeves stretcher was objectively reasonable as a matter of law because "no rational jury could find otherwise." (A.30).

B. There Is No Conflict Among The Circuits Regarding Disposition Of Excessive Force Claims By Summary Judgment.

Contrary to the claim made in the Petition, the circuit courts

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6. The determination of whether a government official is entitled to qualified immunity is also a question of law to be decided by the courts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Thus, the resolution of the objective reasonableness issue on summary judgment is consistent with the policy of encouraging pretrial, speedy determinations of immunity defenses where there is no genuine issue as to the material facts and the evidence is so one-sided that one party must prevail as a matter of law.

have uniformly resolved the issue of "objective reasonableness" as a matter of law where the material facts are not in dispute and a reasonable jury could not find that the police officer's conduct was not reasonable.[7] *See, e.g., Maravilla v. United States*, 60 F.3d 1230, 1234 (7th Cir. 1995) (**Seventh Circuit** affirming summary judgment in favor of police officers on excessive force claim, finding conduct reasonable as a matter of law); *Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511, 1516 (10th Cir. 1995) (**Tenth Circuit** holding officers' actions in handcuffing plaintiff were not unreasonable as a matter of law given totality of circumstances); *Foote v. Dunagan*, 33 F.3d 445, 448-50 (4th Cir. 1995) (**Fourth Circuit** reversing judgment of liability against officer on excessive force claim, finding conduct reasonable as a matter of law); *Krueger v. Fuhr*, 991 F.2d 435, 439-40 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 386 (1993) (**Eighth Circuit** reversing and remanding to District Court for entry of summary judgment, finding officer's conduct objectively reasonable and not violative of decedent's Fourth Amendment rights); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), *cert. denied*, 504 U.S. 915 (1992) (**Sixth Circuit** affirming District Court's grant of summary judgment, finding police officers acted reasonably in using deadly force to apprehend motorist); *Culver v. Town of Torrington, Wyo.*, 930 F.2d 1456, 1461 (10th Cir. 1991) (**Tenth Circuit** affirming grant of summary judgment dismissing plaintiff's § 1983 claim of excessive force); *Reese v. Anderson*, 926 F.2d 494, 500 (5th Cir. 1991) (**Fifth Circuit** reversing District Court's denial of officer's motion for summary judgment, finding officer's shooting of decedent reasonable as a

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7. In some of the cases cited herein, the court directed a verdict in favor of the police officers. Because the standard for assessing whether a litigant is entitled to a directed verdict is "very close" to the summary judgment standard, *i.e.*, where no reasonable jury could find in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the cited decisions involving directed verdicts fully support the courts' power to determine these civil rights claims on summary judgment.

matter of law); *Dean v. City of Worcester,* 924 F.2d 364, 369 (1st Cir. 1991) (**First Circuit** affirming District Court's grant of summary judgment on plaintiff's excessive force claim, finding plaintiff failed to raise trial-worthy issue concerning objective reasonableness of force used to effect arrest); *Eberle v. City of Anaheim,* 901 F.2d 814, 820 (9th Cir. 1990) (**Ninth Circuit** holding officers entitled to directed verdict where as a matter of law finger-hold applied to spectator at football game did not amount to excessive force).

Ignoring decision after decision in *every* circuit in which the courts have decided objective reasonableness as a matter of law, petitioners are left with totally inapposite cases in which summary judgment was found to be inappropriate because either (i) there was a disputed material fact (*see Brisk v. City of Miami,* 726 F. Supp. 1305 (S.D. Fla. 1989)) or (ii) the court in applying the *Graham* standard to the facts of that particular case concluded a rational jury could find the conduct was not "objectively reasonable" (*see Chew v. Gates,* 27 F.3d 1432 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1097 (1995) ; *Hammer v. Gross,* 932 F.2d 842 (9th Cir. 1991), *cert. denied,* 502 U.S. 980 (1991); *Melear v. Spears,* 862 F.2d 1177 (5th Cir. 1989); *Calamia v. City of New York,* 879 F.2d 1025 (2d Cir. 1989)).

For example, in *Chew v. Gates,* a police officer intentionally released a trained attack dog to locate and retrieve plaintiff who had run and hid in a scrap yard from police after being stopped for a traffic violation. The District Court had dismissed the civil rights claim against several defendants on the ground that the Los Angeles police department had routinely used such dogs to apprehend criminals. The Ninth Circuit reversed, finding that a rational jury could have found that the use of an attack dog under the circumstances was not reasonable. 27 F.3d at 1441.

The *Ninth Circuit* in *Chew* did not, evidently, conclude that

the reasonableness of the force is a jury question in every case. *See also Eberle*, 901 F.2d at 820 (directing verdict in favor of officers on an excessive force claim). Rather, the Ninth Circuit determined the reasonableness of the conduct by balancing, as required by *Graham*, "the nature and quality of the intrusion on the individual's Fourth Amendment rights against the countervailing government interests." *Chew*, 27 F.3d at 1440.

The factual bases for the circuit court's decision in *Chew* are what distinguishes it from the case *sub judice*. First, the *Chew* court found that the force used was deadly and the police officer should have expected plaintiff to be severely mauled when he released the dog. 27 F.3d at 1440. Second, the court found that plaintiff did not present an immediate threat of harm to anyone and did not actually resist arrest. *Id.* at 1441-42. Finally, *Chew* did not involve a situation in which the police "were forced to make split-second judgments in circumstances that were rapidly evolving." *Id.* at 1443. Rather, the plaintiff had been trapped in a gateyard for two hours, and there was ample time for deliberation and consultation with supervisors before the police officer decided to release the dog to capture plaintiff. *Id.* Under all of those circumstances, the *Chew* court explained, "the *Graham* factors do not support either side" and reasonableness could not be decided as a matter of law. *Id.*

In contrast, the *Graham* factors all support the objective reasonableness of the police officers' conduct here. The police did not engage in any intentional conduct that would have caused them reasonably to believe that the decedent would sustain any type of injury. To the contrary, the police officers restrained the decedent and the medical personnel strapped her on a stretcher to get her to a hospital for medical help. Second, the decedent did present an immediate threat of harm not only to others but also to herself. Under the circumstances, the police officers had to take some action to restrain her combative condition. Finally, the total

incident occurred within a brief period of time, and the police officers were faced with making split-second decisions in circumstances that were rapidly evolving. Their actions could hardly be said to violate any constitutional right of the decedent. In these circumstances, unlike those presented in *Chew*, no rational jury could conclude that the police officers' conduct was not objectively reasonable.

Nor does the decision in *Calamia*, 879 F.2d 1025, provide any support for the thesis that excessive force claims must go to a jury. The case is also readily distinguishable from the case *sub judice*. In *Calamia*, the officers went to plaintiff's apartment in the middle of the night to arrest him on theft charges. As soon as the decedent answered the door, the police officers immediately shoved him to the floor and tightly cuffed plaintiff's hands behind his back. The evidence showed that the handcuffs were unduly tight and plaintiff was kept in that painful condition for five or six hours with no circulation in his hands while the officers collected certain property. *Id.* at 1035.

By contrast, the evidence here showed that the respondent police officers did not immediately restrain the decedent upon finding that she had illegally broken into an apartment, notwithstanding she was exhibiting violently aggressive behavior. Upon determining that restraints were necessary to protect the decedent from injuring herself and others, however, the police acted quickly and appropriately to gain control of the decedent and promptly move her out of the apartment and to the hospital to afford her medical treatment. (A.29).

Each and every circuit court of appeals has uniformly applied this Court's opinion in *Graham*, adhering to the well-established policy favoring pretrial disposition of cases in which there is no genuine issue as to any material facts and the evidence is so one-sided that one party must prevail as a matter of law. The

District Court and the Third Circuit Court of Appeals in the case *sub judice* dismissed petitioners' excessive force claims against the respondent police officers upon a record of undisputed material facts establishing that the police conduct was objectively reasonable as a matter of law. The Petition for a writ should be denied.

II.

THE DISTRICT COURT CONSIDERED ALL FACTUAL MATERIAL PRESENTED AND DID NOT ABUSE ITS DISCRETION BY REFUSING TO CONSIDER AN "ORAL" EXPERT REPORT SUBMITTED AFTER SUMMARY JUDGMENT WAS GRANTED.

Petitioners also assert that the District Court failed to consider their submissions and their expert reports in opposition to the police officers' motion for summary judgment. They are simply wrong (A.60 n.2). Indeed, the record shows that the District Court reviewed *six* expert reports before deciding respondents' motion for summary judgment.[8] (R.788-827). Notwithstanding that the District Court did not specifically address all of petitioners' expert reports in its written Opinion dated June 7, 1994, a review of the transcript of oral argument of the summary judgment motion (not included in petitioners' appendix) destroys petitioners' assertion. (Resp. App. 13a-15a; 19a-23a).

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8. Petitioners' counsel was given at least three extensions to obtain the expert reports they deemed necessary to support petitioners' claims. By the final deadline, December 29, 1993, petitioners had obtained two reports from Robert diGrazia, an alleged expert on police procedures, a report from Bennett M. Derby, M.D. and a report from Richard J. Hansson, Esq., EMT-P. After respondents filed their motions for summary judgment, petitioners obtained a supplemental report from Mr. Hansson and a supplemental report from Mr. diGrazia. All of these reports, including the ones that were untimely, were considered by the District Court.

During oral argument, the District Court specifically questioned counsel for the respondent police officers concerning the import of petitioners' expert reports to the motion before the court. (Resp. App. 19a-22a). In addition, although petitioners failed to provide this Court with the transcript of oral argument, the written opinion denying petitioners' second motion for reconsideration reveals that the District Court considered *all* of the evidence submitted by petitioners in opposition to the respondent police officers' motion for summary judgment, including their expert reports. (A.60-61). In that opinion, the District Court unambiguously stated:

> The Court has carefully reviewed all papers submitted and determines that no viable basis has been submitted by any party for reconsideration of the opinions and orders previously entered in this matter.

(A.61). Finally, the District Court noted that although it had not considered the one untimely expert report, the "Court has also considered plaintiff's supplemental affidavit dated June 16, 1994, and its exhibits." (A.60 n.2). That supplemental affidavit and exhibits contained the very information petitioners now assert was not considered.

Because the District Court considered petitioners' expert reports, the cases cited by petitioners — *Russo v. Cincinnati*, 953 F.2d 1036 (6th Cir. 1992); *Technitrol, Inc. v. Control Data Corp.*, 550 F.2d 992 (4th Cir.), *cert. denied*, 434 U.S. 822 (1977); and *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) — are inapposite. *Kopf* dealt with the court's wholesale exclusion of all expert testimony and not the refusal to consider one of seven expert reports that was submitted in an untimely fashion in support of a motion for reconsideration. *Russo* involved the usefulness of expert testimony in a failure to train claim, not a claim of

excessive force. *Technitrol* stands for the unremarkable proposition that summary judgment is inappropriate where conflicting expert opinions are determinative. None of these issues is present in this case.

The lower courts' decisions in this case comport with the established principle that untimely evidence submitted in support of a motion for reconsideration is wholly improper and need not be considered by the court in its discretion. The court's refusal to consider petitioners' one untimely expert report (while considering six others) was not an abuse of discretion and is not in conflict with decisions in any other circuit. *See Semper v. Santos,* 845 F.2d 1233, 1238 (3d Cir. 1988) (trial court's exclusion of testimony because of failure of counsel to abide by pretrial order not an abuse of discretion).

Petitioners also criticize the courts below for allegedly adopting the "factual contentions" of the respondents without commenting on the so-called substantial evidential submissions by petitioners. This argument is false, and petitioners fail to identify a single material fact that the courts below failed to consider or any material facts that were in genuine dispute.

The facts and circumstances of the incident that occurred on the night of May 20, 1989 are well-documented in the uncontroverted deposition testimony of the nine eyewitnesses who were present. The District Court had all the evidence before it when it granted summary judgment in favor of the respondent police officers. Petitioners did not — and could not — submit any evidence to dispute these facts because no such evidence existed. In these circumstances, petitioners properly suffered entry of summary judgment against them.

In any event, the expert reports submitted by petitioners were insufficient as a matter of law to avoid summary judgment

dismissing petitioners' civil rights claims. Even assuming *arguendo* (contrary to the evidence in the record) that the decedent was improperly strapped onto the stretcher,[9] as petitioners' experts opined, the respondent police officers' conduct in assisting the medical personnel in this act would not, as a matter of law, amount to an unconstitutional use of force. *See Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (whether substantive liability or qualified immunity is at issue, "a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently"). At best, this conduct would amount to negligence or medical malpractice which is insufficient to support a civil rights claim against the police officers. *See Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995) ("To pinion the police in the center of such a medical dispute is unfair and unwise").[10]

The Petition represents a groundless attempt to seek still further review of a decision petitioners simply dislike. No writ should be granted.

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9. The undisputed record established that the respondent police officers neither positioned the decedent on the reeves stretcher nor fastened the straps on the stretcher. Thus, there is simply no factual basis for this claim against the respondent police officers.

10. Following dismissal of petitioners' federal civil rights claims, petitioners brought suit against the respondent police officers and all the other defendants in state court alleging negligence and a host of other state law claims. That suit is currently pending.

CONCLUSION

For the foregoing reasons, respondents Michael Cooper, Robert Hochstuhl, Charles Priolo and Michael Behre request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED MAY 23, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCKET NO. 2-91-cv-02140

Transcript of Proceedings

Monday, May 23, 1994
Newark, New Jersey

BARBARA LEE PERLMUTTER,

Plaintiff,

vs.

MICHAEL COOPER, et als,

Defendant.

CIVIL ACTION

BEFORE:

THE HONORABLE JOHN W. BISSELL, U.S.D.C.M.

APPEARANCES:

MARIA DELGAIZO NOTO, ESQ.,
Attorney for Plaintiff

Appendix A

SAIBER, SCHLESINGER, SATZ
& GOLDSTEIN, ESQS.,
Attorneys for Defendants Cooper, Hochstuhl,
Priolo and Behre
BY: JENNINE DISOMMA, ESQ.

GACCIONE, PAMACO & BECK, ESQS.,
Attorneys for Defendant, Township of
Bloomfield,
MICHAEL J. CASALE, ESQ.

HURLEY & VASIOS, ESQS.,
Attorneys for Defendant Davis
BY: JUDITH IBER, ESQ.

GEBHARDT & KEIFER, ESQS.,
Attorneys for Defendants Bloomfield
Emergency Squad, Menzel and Depczek
BY: DARREN GILLIATI, ESQ.

[2] THE COURT: Once again, appearances for the record, please.

MS. NOTO: Mary Noto, attorney on behalf of Dr. Barbara Lee Perlmutter. Seated next to me is my associate Amy Millman Kershner and Ms. Perlmutter.

MS. DISOMMA: Good morning. Jennine Disomma of Saiber, Schlesinger, Satz and Goldstein. We represent the individuals officers, Cooper, Hochstuhl, Priolo and Behre.

MR. CASALE: Good morning, your Honor, Michael R. Casale from the firm of Gaccione, Pamaco and Beck, also

assistant township attorney for the Township of Bloomfield, defendant in this matter.

MS. IBER: Judith Iber from the law firm of Hurley and Vasios for Davis.

MR. GILLIATI: Good morning, Darren Gilliati from the firm of Gebhardt and Kiefer for Bloomfield Emergency Squad and Mr. Depczek and Mr. Menzel.

THE COURT: All right, thank you. I realize as I recall the Mr. Gilliati your clients have already been dismissed from this case?

MR. GILLIATI: Yes, it is my [3] understanding there has been a motion for reconsideration which technically has not been cited so far as our understanding, that's why we monitor it. I have —

THE COURT: I wasn't certain that is the case. It is not before us today but I appreciate that clarification. As far as the motion of the defendant, Mountainside Intensive Care Unit and its employees, that motion is still under advisement by this court and I am not going to hear additional argument on that today either, although it may be that some of the arguments advanced here will be pertinent.

The movants today are essentially the Bloomfield police officers, correct?

MS. DISOMMA: That's correct, your Honor.

THE COURT: And I don't know whether the Township of Bloomfield as such has formally joined in this motion but it

would appear that their liability would be predicated essentially on the Amelda premier and if the court were required or determined that it would dismiss as to the Bloomfield police officers, it would appear there is little basis for continuing to hold [4] the municipality in.

I don't know, someone will take issue with that concept but, it is something that we can deal with as we go along. I will hear — Ms. Disomma, I will hear from you first. I will then hear from Ms. Noto. If there are other counsel that feel that there's — that they have something to add, then I will hear from you in the last instance.

Proceed, please.

MS. DISOMMA: Thank you, your Honor. Your Honor, the police officers have filed a summary judgment motion dismissing the entire —all of the claims brought against them, that would included both the civil rights claims and the negligence claims. First I will focus on the civil rights claims.

THE COURT: You are talking about negligence claims, those, of course, are asserted pursuant to the New Jersey Tort Claims Act, is that correct?

MS. DISOMMA: That's correct. First I will address the civil rights claims. The plaintiff, which is Dr. Perlmutter, has asserted civil rights claims on behalf of her daughter, Ann Perlmutter, the decedent.

[5] These civil rights claims essentially arise in two ways. The first thing is Dr. Perlmutter asserts that the police officers restraint of her daughter was a violation of her daughter's civil

rights. The second issue and the second claim raised by Dr. Perlmutter is the positioning of the decedent on the stretcher when she was being removed from the apartment where this incident occurred, also provides a basis for Dr. Perlmutter to recover on a civil rights claim.

First I will address the restraint issue. The issue here is whether or not the police officers restraint of the decedent was objectively reasonable under the circumstances that confronted them at the time of the incident.

It is not a situation where we now look back with 20/20 hindsight on what happened to determine whether or not their conduct was reasonable, the Supreme Court in *Graham* expressly stated that the standard is whether or not at the time, based on the circumstances that confronted them, it was objectively reasonable for them to restrain the decedent.

Let's look at the circumstances that confronted them at the time. They were called to [6] the apartment of one Mrs. Julia Sanowski, an elderly woman who resided with her even more elderly father who was apparently disabled and couldn't get out of bed.

THE COURT: I am familiar with the facts in this case, I don't think you have to belabor them, although I will certainly allow you to emphasis any particular aspect of them that you think is particularly important.

MS. DISOMMA: I will not waste your time then, I will go right to the heart of the matter. What confronted the police officers at the time that they entered the apartment was a young woman obviously under the influence of drugs who was

terrorizing the occupant of that apartment by running around the apartment in a crazed state, shutting off the lights, making — screaming incoherent noises. The decedent ends up in their bedroom where she begins to run about the room, violently moving her legs and arms, again screaming, yelling, out of — totally out of control.

THE COURT: She had arrived through the window initially?

MS. DISOMMA: That's correct, [7] she had crashed through the window of Mrs. Sanowski's apartment at 1 o'clock in the morning. The police officers arrive, they take a statement from Mrs. Sanowski, they observe the decedent in this condition.

The police offices state what they did to control the situation. What did they do, they got on their hands and knees next to the decedent and tried to talk to her, try to coerce her into coming down so they can assess her medical condition because the testimony is clear she had dry spats of blood about her body.

She was clearly under the influence of drugs, clearly needed to some kind of attention; whether that be some kind of medical attention, either psychological or physical.

Initially she responds to their coaxing and she sits up and she's quiet and they are talking to her and they are talking to her and all of a sudden, unprovoked, she lunges for a stand alone mirror in the room and attempts to bring the mirror down on her and them. At that point the violence escalates. She starts kicking, punching and this time the movements are directed to the police officers.

[8] The medical personnel arrive on the scene, that's the BVS, Bloomfield Volunteer Squad, as well as paramedics from Mountainside Hospital. They have all unequivocally testified that they could not do an assessment of the decedent because of her uncontrolled violent state. What choice did the cops have in this situation but to restrain the decedent to prevent her from further injuring herself, which she obviously demonstrated a propensity to do in light of the lunging at the mirror; two, to prevent her from injuring them or the occupants of that apartment and they have an obligation to those people also; and three, to provide the medical personnel with an opportunity to assess her medical condition which they could not do under the circumstances.

In fact one of the paramedics testified when anyone went near her she was trying to bite the hands, the hands of the people who went near her.

I submit that there can be no question under the circumstances it was objectively reasonable for the police officers to restrain the decedent by handcuffing her hands behind her back and securing her and ankles with a bed sheet. That is all they did.

[9] THE COURT: Am I correct that this cast of objective reasonableness is based on what confronted the officers at the time is virtually the same in determining what civil rights claim has been made out in the shall we say as would be applied in determining whether these officers enjoyed immunity versus *Harwood vs. Fibert?*

MS. DISOMMA: That is also correct and it's the same standard to determine whether or not they are entitled to

immunity under the state claims for the negligent actions. It is exactly the same standard objective reasonableness.

THE COURT: Thank you.

MS. DISOMMA: It is a matter of law to be decided by the court.

In response to this scenario, plaintiffs argue a couple of things. The first thing they argue is that the police officers acted inappropriately because this was a medical emergency. Your Honor, the plaintiffs paint this as if the police arrived and there was a hemorrhaging, unconscious, dying young woman that they handcuffed and threw her on the stretcher.

The facts do not support that [10] interpretation. The facts in this case are undisputed. Every single eyewitness to this incident, including Mrs. Sanowski's, the paramedics, everyone has all consistently testified how this woman acted when the police arrived at the apartment.

Yes, she had dry blood on her body. Everyone said the blood was not flowing at the time she arrived. She clearly was not having a seizure. There is absolutely no evidence to support that. Her eyes were open, she had good color, her movements were purposeful as opposed to involuntary.

Plaintiff is raising all of these red herrings to keep a civil rights case going that should not be here.

Oh, and by the way, plaintiff's own expert — plaintiff retained a procedures experts, a police procedures expert — their own expert does not opine that under these circumstances it was

inappropriate to restrain the decedent. He doesn't say that in his report. He doesn't say it was inappropriate to restrain the decedent or the manner of restraint was improper.

That is the best evidence of all, not only [11] is there no factual testimony, there isn't even expert testimony to support a claim here that the place officers' restraint of the decedent was a violation of her civil rights.

The second aspect of the plaintiff's claim, and I might add this is kind of a new thing that's been added to the case since these motions have been filed, is that the positioning of the plaintiff's decedent on the Reeves stretcher was improper and constitutes a violation of her civil rights.

Couple of comments on this claim. First of all, there is no question of fact or credibility with respect to the positioning of the decedent's face. Initially in the pleadings plaintiff claims that the police officer stated she was face down and her face was buried in the Reeves stretcher. Incorrect. Every single eyewitness to this case has testified that the decedent's head was to the side, her stomach was down.

The plaintiffs have also testified that the term face down in police jargon means stomach down. There is no positioning of a face down. You would never put anybody face down. Interestingly, plaintiff's expert in his clarification letter that [12] I received this week agrees. He says face down in police terminology means stomach down, face to the side. There is no question that this woman's face was not buried in the stretcher. That's point number one.

Point number two is this: everyone agrees in this case that once the medical personnel arrive at the scene they, and not the

police officers, are responsible for the care, medical care, rendered to the decedent. In this case there has been testimony that the medical personnel arrived just as the police officers were restraining the decedent. They will testify she should have been restrained so they can do their assessment.

At that point the BVS and the police officers were placing the decedent on the Reeves stretcher, BVS testified they couldn't do it themselves, even after this woman was restrained she continued to struggle, fight, bite the hands that came near her so the police officers have all testified, "Well, yes, I may have helped put her on the Reeves stretcher, I don't remember. Someone helped but we don't know who did."

Why don't they know? Because this was an emergency situation, they were all acting at the [13] moment trying to do what was best for this young woman. So she's placed on the stretcher. At most police officers assisted the BVS in placing in woman on the stretcher.

The testimony is undisputed that she was placed with her stomach down with free movement of her head at all times. All the witnesses have testified that as she was being lifted onto the stretcher and removed from the apartment she continued to move, scream, yell, bite, giving no indication whatsoever that she was having any kind of cardiac arrest. Even assuming that, placing someone on a stomach was not the most appropriate way, plaintiffs expert say well, she should have — may have been — may be placed on her side.

Your Honor, with all due respect that is not what makes a civil rights case. If anything, that is a negligence claim and I am not even admitting here that they were negligent in doing what

they did because under the circumstances they did what they could.

If plaintiff is trying to assert that these police officers and BVS had the obligation to hold her in place on her side while she's moving around biting them, I mean it is absolutely ludicrous. [14] Why did they put her on her stomach? Officer Priolo tells us why you don't put someone on the back. If they regurgitate, which is common in drug cases, they will choke on their regurgitation.

The point was these people were moving in an emergency situation. They wanted to get her out of the apartment. The apartment was cramped with a lot of furniture. They couldn't maneuver her there, they wanted to get her out, get her outside, do a medical assessment of her and get her to the hospital.

There is nothing here to support a civil rights claim. In a civil rights claim what is pertinent had to be maintained on these facts that would open the flood gates for every single time a police officer makes an arrest, takes someone into custody, assists a victim, that would open the flood gates for civil rights claims.

We need to differentiate between what is civil rights that is egregious behavior that shocks the conscious of the court under the 14th Amendment and negligence, which I believe is what the plaintiff is trying to assert here.

THE COURT: Please close with a few comments if you have anything to add concerning [15] the New Jersey Tort Claims laws. I have a long list and I want to move along.

MS. DISOMMA: The other thing I wanted to say the 1985 claim which I didn't address and I will do that very briefly, there

is no 1985 claim here for two reasons. First of all, plaintiff hasn't established a 1983 action which is a requirement. Second, plaintiff cannot establish that anything a police officer did was because of the decedent's race.

The police officers reasonably believe the decedent was white. The reason they believe that is because she looked white, the police report says she was white, the BVS report says she was white, all the police officers reports prior to this incident — Ann Perlmutter is known to the police department, she had a lot of prior incidences regarding the drug overdose and braking into people houses, every report says she is white.

The best evidence is all of the treatment Ann Perlmutter received. In every one of those records it says she is white, which means one two things; either Ann Perlmutter represented to the world she is white or these people taking the intake believe she was white from looking at her. [16] There is no evidence here to say that this woman was black or they treated her differently because of her race.

With respect to the state claims, your Honor, the Tort Claims Act provides immunity from the officers under these circumstances. The Supreme Court has directed when analyzing cases under the Tort Claim Act first you look to see if there's an immunity that covers an officer before you look to the negligence. Here, *N.J.S.A.* 49:3-3 clearly gives these police officers immunity for the good faith execution of their duties.

The standard under the Tort Claims Act is exactly the same as it is under *Harlow* for determining whether or not the officers are entitled to qualified immunity for their civil rights for the civil rights claims and because of that they are entitled for immunity for the state claims.

THE COURT: Thank you.

Ms. Noto, anything to add? I have heard your cross in the past, particularly regarding the underlying facts here, but anything you would like to emphasis particularly as it entertain the police officers, I would be happy to hear you.

[17] MS. NOTO: Thank you, your Honor. Judge, just for the record, I would note that I object to any comments by counsel for the defendants who are not a part of this motion. This motion, of course, was brought only by the defendant police officers and not by any other defendant.

As I sat here today and listened to counsel for the police officers' oral argument it became even more clear to me, I think, that what counsel is basically asking the court to do is accept as fact what her clients say and not go any further than that.

Additionally, it seemed to me that some expert opinions were being offered to this court absent an expert report, and of course with the fact that of course counsel is not an expert and is not qualified to offer any expert opinions as to the cause of death.

I think one of the things that is important that this court remember is that there are basically two expert opinions in this case as to the cause of death. Defendants have not provided the court, nor us, with an expert's report.

So what we are dealing with from a medical [18] viewpoint is the opinion of two doctors. One of them is the doctor who did the autopsy, and his report is part of our appendix. I believe his name is Dr. Senha. And what Dr. Senha says is that the decedent died an accidental death of blunt trauma force to the head. So that's one

opinion. The other expert opinion offered to this court is that of Dr. Durky, our medical expert, and it is Dr. Durky's opinion that as indicated in his report that we provided the court with, that what the decedent ultimately died of or the cause of her death was hypoxia, which is, of course, lack of oxygen.

But whether you accept, and of course it is not this court's province to really make a factual determination as to what opinion you are going to accept, but whether you accept the pathologist opinion or whether you accept Dr. Durky's opinion, the decedent did not die of a drug overdose.

The counsel for defendant police officers stresses over and over that the decedent had a drug problem. However — and I can only call it insinuations because there are no facts to support it, her insinuations that really what killed the decedent was drugs is absolutely completely [19] unsupported by the record and unsupported by any expert testimony.

In fact, one of the things that Dr. Durky notes in his report was that the decedent, while her urine was positive for cocaine, her blood at the time of her admission into the hospital was negative for cocaine. According to Dr. Durky that would indicate only past ingestion and would not indicate that the decedent, during a recent time span, consumed cocaine.

THE COURT: It seems to me that may not be particularly critical here other than in terms of verifying at least to some extent the nature of her actions within this apartment. And frankly, whether they are cocaine induced, or alcohol induced, there doesn't seem to be anything of that here, or inherent dementia or personality disorder that nobody seems to know anything about it frankly is not that material as far as I can see it.

Appendix A

The question is what type of conduct were the police required to react to and did they react in an objectively reasonable fashion given the circumstances and the moment with which they were faced.

[20] MS. NOTO: Judge, the —

THE COURT: I am not going to assume at all that the cause of her death had anything to do with drug ingestion and I don't think I'm being asked to do so.

MS. NOTO: I brought that before the court because it was brought up by counsel for the defendant police officers and I think that the gist of what the defendant police officers are arguing is that because, and I think it says that in their brief, that she was in a drug crazed state and, therefore, acting in this violent manner. However, what I would like the court to take notice of is the facts that were argued by counsel for the defendant police officers are really just one side of the story and are not undisputed facts.

THE COURT: That's the other point I would like to discuss with you, and we've had to deal with this before in connection with other motions, what description of the events transpiring in the apartment, on the stretcher, out to the ambulance and even within the ambulance, what description from any eyewitness is still to come? Presumably we've got them all, haven't we, in terms of all depositions or affidavits from all [21] of the surviving eyewitnesses to the event, is that correct?

MS. NOTO: Yes, your Honor.

THE COURT: Is there anything within the description of those facts from any witness which would demonstrate to the

court that these police officers did not act in an objectively reasonable fashion given the circumstances with which they were confronted? You say for instance that is only one side of the story. Where is and what is the other side of the story if it can be told here?

MS. NOTO: I think if we are looking at whether it was reasonable you have to look at all the facts that have come forth in discovery and the facts that have come forth in discovery through the depositions and through the police reports have indicated that there were at least four police officers there in addition to other medical personnel, despite the fact that the medical technicians, Davis and McNiff, say that the decedent was cursing and acting in a violent manner, I think it is important for the Court to know that in all of the depositions of the police officers, every police officer agreed that the [22] decedent in fact was not coherent, was not able speak, that the sounds coming from her were guttural sounds.

These are sounds that are consistent with seizure and in fact the police officers did agree to that. Additionally, all of the police officers agree that the person they were dealing with, who they called patient, they did not say that this was like in *Graham* — one of the cases cited by defendant police officers is *Graham vs. Connor* and they site that case in support of their objectively reasonable argument.

However, I looked at that case and I thought that that case supported opposition, but let me get back to that because I know I am not answering your question if I go off on that legal tangent.

But the depositions establish that this was a small woman, that when the police got there she was lying on the floor in the

bedroom. The deposition establish that she had been there for several minutes. Mrs. Sanowski, the woman whose apartment she had come crashing through, and I think you need to remember respectfully that we do not know how exactly she came crashing through the apartment, however there was testimony from the [23] police officers that they became aware that she had a relationship with a man on the third floor and they questioned this man after the incident and in the course of going up to the third floor and questioning him they also examined the hallways and found blood in the hallways and a shattered glass on the third floor and they did some kind of a cursory investigation but never really pursued it.

And I point that out to the court only to bring to the court's attention to the conclusion that this was some kind of a crazed, violent individual that was running around causing damage is only one conclusion that can be drawn from the facts that are presented and certainly another conclusion based on the fact that there was blood on the third floor, that she had been living with this person who had been — who had provided her —this much older man who had provided her in the past with drugs and who had assaulted her. Police had been called there. This person had assaulted her in the past.

Certainly the fact that she came crashing through the window could also be a conclusion resulting from the fact that she had been beat once again by this man because of the trauma to her, she [24] was incoherent, she was dazed and either he was chasing her or in an effort to escape from him she went through that window.

Every police officer who was there, all of the medical personnel that were there, all of the ambulance people that were there agree that this little girl, because that's basically what she

was, she was basically about five foot two and 105 pounds, did not hurt anyone. Everyone agrees that she did not touch anyone.

So the argument that the police were really trying to control this crazed, violent individual only comes from counsel. It does not come from discovery, it does not come from the police report. In fact, what the police say in their deposition is that they were trying to protect this woman from herself and certainly whether or not that's credible has to be looked at in terms of what they did in trying to protect her because ultimately we know from our expert that what they did in trying to protect her was to kill her and even if you don't accept that at this point but in looking at the credibility and I don't even think at this point you should be making a credibility determination.

[25] THE COURT: Absolutely not. I am not being asked to do so and I can't. It would be an irreversible error in a summary judgment context, no doubt about it.

MS. NOTO: Absolutely, your Honor. In looking at the reasonableness that the police contend they did to protect this five foot two, 105 pound individual from hurting herself you have to look at what they did. Was it objectively reasonable for the police to take this person's hands, cuff them behind her back, take a sheet, roll it several times around her ankles, tie her ankles together, take this young girl, lay her prone, whether it is face down or face to the side, everyone agrees that they put her — they put her stomach down, torso down —

THE COURT: Stomach down.

MS. NOTO: — on a Reeves stretcher which we found out from depositions is a soft leather kind of stretcher, strapped her three times to that stretcher then took that stretcher and again

placed her stomach down on top of another cot, put blankets on her and strapped her with additional straps to that other cot.

It is Dr. Durky's opinion that whether her [26] face was down or to the side the restraint on her diaphragm, having her hands cuffed behind her back and then strapped down, face down, torso down, interfered with her breathing and in looking at the objective reasonableness of this, I think you have to accept, Dr. Durky's report.

You have to accept Mr. Debroski's police practices and procedures report because there are no — there is no report that contradicts that from the defendant police officers and I would submit that there is no report that says that was proper because it wasn't proper.

So in looking at the objective reasonableness I think you also have to look at the fact that these police officers in their depositions and in their reports did not characterize this person as a suspect, they did not say they were arresting her. Obviously they seized her. There was no place she was going. Her movements were restrained. They themselves also called her a patient.

THE COURT: Ms. Noto, would you bring your remarks to a close, please?

MS. NOTO: Judge, I really have nothing further to add unless there is something [27] that you want me to address.

THE COURT: No, I don't think so.

Ms. Disomma, I agree, I don't think it is necessary for me to a hear from other counsel. This is your motion and you certainly argued it adequately. I just have one question for you.

Appendix A

Let us assume that I were to agree with you in terms of your analysis of the events that transpired here, and frankly I'm inclined to do so we don't — nobody can be asked to sit essentially and exercise the type of 20/20 hindsight that perhaps is being argued here, and of course summary judgment is available in these context, that's what *Howell vs. Fitzgerald* tells us. But what if we are faced from the other side with expert reports that say all right, Ms. Perlmutter didn't survive, the other participants in this thing have all described these facts in ways which they believe demonstrate justification of their actions and we are prepared to accept that there is no choice that is what they are going to testify to.

Nevertheless, when experts believe this action was inappropriate for the following reasons, A, B, C, D, and what have you, does the presence of [28] those experts reports themselves generate the type of situation as a matter of fact or law that allow this case to survive for trial?

MS. DISOMMA: I believe it does not, your Honor, and I will tell you why. Let me say this, the plaintiff's expert reports do not say anywhere that what the police officers did here was inappropriate or not reasonable under the circumstances. Nowhere, and I challenge plaintiff's counsel to pull out Mr. Debroski's report to show it to the court, Mr. Debroski's report does not say it was inappropriate to restrain the decedent or the manner of restraint was inappropriate.

I have an expert report that was says it was appropriate. This is isn't a battle of expert reports, this is undisputed facts. Why do I need an expert if her expert supports my position?

THE COURT: Essentially what you're saying is arguably at least is if you introduce your expert's report it might generate the

type of issue that you wish to avoid, therefor you are not presenting it?

MS. DISOMMA: Not in this case because my expert and her expert say the same [29] thing. My expert says what her expert says by omission. Her expert does not say it was inappropriate or improper for the police officers to restrain the decedent under these circumstances. One would anticipate that if one goes out and spends thousands of dollars to pay an expert to come in and testify and the expert does not say the restraint was inappropriate that is that he is not going to say it was inappropriate.

THE COURT: I suppose also even if the reports were to say that it was inappropriate or demonstration of negligence or not the best choice or what have you, that doesn't mean that the events rise to the level of either a 1983 or 1985 or a New Jersey Tort Claims Act case, correct?

MS. DISOMMA: That is exactly my next point. For reasons of immunity you mention —that is my point. Even if he said it was inappropriate when your Honor looks at the facts that confronted these officers when they entered that apartment, it is objectively reasonable what they did. Plaintiff's counsel doesn't offer any other explanation as to what they should have done. What should they have done, left this woman there [30] flailing about Mrs. Sanowski's apartment? What other choice did they have here?

THE COURT: Thank you.

MS. DISOMMA: With respect to the medical —

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MS. NOTO: Could I briefly respond to that? What they should have done is not retrained her in such a manner that she couldn't breath. They very well could have restrained her hands in front of her chest if they felt that was necessary. These were four big police officers. They certainly could have tried other means to restrain her in a way that she could continue to breath.

Additionally, it should be noted that the depositions of the police officers do not indicate that anyone even gave a key to unhook the handcuffs of the hands of the decedent to the ambulance personnel when they left with her. That obviously protecting — that is one factor that a jury could consider in determining whether or not they really — the police officers were really concerned for the protection of the decedent. If they were so concerned for her protection, they wanted her to live so much, then why didn't they at least provide [31] the handcuff keys to the ambulance personnel after she was taken away?

Additionally, with regard to the Tort Claims Act, I think it is important to note that that act says that police officers in the absence of good faith, which I agree is objective reasonableness, can be held liable for wrongs and injuries which occur during the course of their employment.

So I think it is not just a negative act, it is also a positive act, it is an act that gives people the right to bring lawsuits absent one of the exceptions.

Additionally, it is absolutely untrue that our expert does not say that the restraints imposed by the police were improper. He absolutely says that they were improper and we appended them to our appendix. He says that the police acted inappropriately in handling the situation. "They were grossly negligent. They acted

with reckless disregard for the welfare of Ms. Perlmutter by placing her in a prone position on the stretcher and failing to provide for the protection of the airway." But he goes even further and in his additional report he explains that whether or not she was prone is not the be all, whether or not she [32] was face down, whether her face was in the stretcher is not the be all and end all of his opinion.

He emphasizes, and I think you have to keep this in mind that you are not dealing with a situation where an armed robber is running away from the police and they have the right to shoot him even if that results in his death. You have a situation where you are talking about somebody who has been hurt before the police even get there. It is not true, and I beg the court to review the depositions if the court has not done so, it is simply not true that the decedent was not bleeding to the point where it would be noticed.

All of the police officers testified that they saw blood on the victim. All of the police officers testified that they saw blood on her head, that they saw blood on her hands, they saw blood on her legs. All of the police officers testified that she was incoherent. Under the objective reasonableness standards, under *Graham vs. Connor which is cited over and over by the defendants* this is a case that has to go to a jury.

It would — Judge, I would just like to site a portion of *Graham vs. Connor* to the court. As [33] the court noted, "Because the effect of reasonableness on the Fourth Amendment is not capable of precise definition, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue."

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Most of the cases, all of them, I think cited by the defendant police officers involve a situation where a criminal, usually a violent criminal, is running away. So, the severity of the crime at issue is one of the considerations that according that the United States Supreme Court in *Graham vs. Connor* set forth as proper for this court to consider in determining objective reasonableness.

So you look at the severity of the crime at issue in this case and you have to go to the depositions of the police officers. I'm saying go beyond the police report which lists decedent as a victim but go to the depositions of the police officers. They all agree that she was not under arrest, she was not going to be charged and this was not done for purposes of preventing a felon on from fleeing.

THE COURT: I certainly agree [34] with that and I don't think the other side disputes that either.

MS. NOTO: Then the next criteria that the United States Supreme Court sets forth in *Graham* for this court to consider in determining objective reasonableness is whether the suspect poses an immediate threat to the safety of the officers or others. So, in considering that does she pose an immediate threat, I think you have to look at what had gone on prior to the police tying her together, handcuffing her behind her back and helping to strap her down face down on a stretcher.

No one had been hurt. She had no shoes on. That's clear. She's a little girl she's not a heavy girl, she has no shoes on, she's bleeding from her head, her hands and her feet. The police officers all agree she did not hurt them, she did not touch them in any way whatsoever.

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According to the deposition testimony, both theirs and Mrs. Sanowski's, there was a free standing mirror, the police officers thought that she made a motion toward the mirror and it is based on the fact that they are saying, and this I submit is a factual issue, an issue as to whether she even [35] made that motion to the mirror, but again you come back to was it reasonable.

Based on her — according to the police officers — making a motion to the mirror and maybe she might have brought the mirror down on herself because that is what they say in the deposition testimony. Not what Ms. Disomma says. That's what they say in the deposition testimony.

So then what this court has to consider is was the fact that she might have somehow brought the mirror down sufficient cause to make it reasonable, objectively reasonable, for the police to then take this very, very critically injured young girl, tie her up, put her face down, strap her down and whether her face was in the middle of the stretcher or not, one of those straps goes right across the neck, so whether her face was to the side or not, was it reasonable for the police to then not only restrain her but tied her, handcuff her behind the back, not give the key to the ambulance personnel and treat her in that manner because they were stopping her from hurting herself and their help resulting in her death.

THE COURT: Thank you.

Just a moment. We're done. This court has [36] absolutely no criticism of the self-advocates before me. This has been a zealous argument. There are important considerations that run in connection with both sides of this matter.

Police brutality if it exists is not to be countenanced and it is among the reasons that section 1983 is available for the address of

bona fide claims. Equally important, however, at least as a matter of public policy is the fact that the police have to react in an infinite variety of circumstances on the spot, using whatever their best judgment may be at the time.

It is in a recognition in part of those competing interests that the standards involved by this type of conduct is measured essentially a standard of objective reasonableness viewed by — from the point in time and the circumstances in question as best one can do so.

The court is very mindful that it may not usurp the function of a jury in connection with the findings of facts. On the other hand, summary judgments in matters such as this kind have been endorsed by the United States Supreme Court in *Howell vs. Fitzgerald* in rating the objective reasonableness standard in that case and in the [37] context of immunity available to governmental officials.

Therefore, in making this decision certainly in its own perception, and I will have a little bit more to say about this in writing, is not upsurging the jury function, is not upsurging the duty for what the jury might determine.

I have reviewed the depositions and the other presentations of fact regarding this case. It is true that Ms. Perlmutter is not her to speak for herself. That's the reason we are all her in court. Whether she would have a different version of the facts we will never know and surely that in itself cannot be used as a source for the genesis of supposedly genuine issue for material facts. No one would suggest that.

It is this court's view that there are no genuine issues of materials fact and when measured objectively under the

standards of reasonableness that we talked about today, the conduct of the police officers is not actionable, it is not actionable under Section 1983, it is not actionable under the New Jersey Tort Claims Act.

It is this court's view as well, therefore, that without any basis in liability on behalf of [38] the police officers that the matter must be dismissed as to the municipal defendants as well. I suppose the theoretical argument could be made that the municipal defendants were lax in terms of any training or manuals or whatever, what have you, in sort of reliability that is often imposed under the manual doctrine, whereas here the court has determined that there is no actionable conduct by the police officers anyway then there could be no cause or nexus between any lack of training.

I realize that the Bloomfield defendants or the municipal defendants as such did not formally join in this motion and although it is supported, I think there was a letter indicated they supported it, nevertheless I do believe that the plaintiff, not only on the motion of these defendants, but also in the motions that have preceded it, certainly was on ample notice and had ample opportunity to present to this court whatever circumstances might hold admissible defendants as well as their agents or police officers.

So the court feels that it is impowered to entered summary judgment on behalf of the Township of Bloomfield, et al, without requiring a formality of a separate motion from that defendant.

[39] I have under advisement as well as you know here the prior motion brought on behalf of the Mountainside Hospital M.I.C.U. I would be issuing a written opinion in connection with

the motions before me today, that will be accompanied by an opinion as well granting the motion of those defendants.

What happened here was a tragedy, but there are occasions and probably not infrequent when the happening of the tragedy doesn't necessarily cast liability upon those who are on the scene and taking some action in connection therewith. This is one of those cases.

The opinions will be more elaborate. Thank you .

MS. NOTO: Judge, will your Order be signed today or will it be signed at the time —

THE COURT: The Order will be signed at the time the opinions are issued for purposes of the commencing of any time for appeal and I will try to get them out as quickly as I can. I want to be thorough.

MS. DISOMMA: Thank you.

(Proceedings concluded.)

* * *

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[41] CERTIFICATE

I, KATHRYN BRIGGS-KRAUSE, a Certified shorthand Reporter and Notary Public of the State . New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings, on the date and place hereinbefore set forth.

s/ Kathryn Briggs-Krause,
KATHRYN BRIGGS-KRAUSE, C.S.R.
LICENSE NO. XI01276.